

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Amendment of Section 73.202(b),)	
Table of Allotments,)	MM Docket No. 01-19✓
FM Broadcast Stations.)	RM-10048
(Saint Joseph, Clayton, Ruston, and)	RM-10027
Wisner, Louisiana)')	
)	
(Wisner, Ruston, Clayton, and)	MM Docket No. 01-27
Saint Joseph, Louisiana)')	RM-10056
)	RM-10118

REPORT AND ORDER

Adopted: January 6, 2003

Released: January 8, 2003

By the Assistant, Chief, Audio Division:

1. The Audio Division has before it *Notices of Proposed Rule Making* in two related dockets, MM Docket No. 01-19 (*Notice I*)³ and MM Docket No. 01-27 (*Notice II*).⁴ *Notice I* was issued in response to a rulemaking petition tiled by Saint Joseph Broadcasting Company ("SJBC"). Comments were filed by BK Radio ("BK") and SJBC; comments and a counterproposal were also filed by Ruston Broadcasting Company, Inc. ("RBC"), licensee of Station KNBB(FM), Channel 257C3, Ruston, Louisiana. Reply comments were filed by SJBC, RBC, and New South Communications ("New South"). After the pleading cycle ended, Communications Capital Company II of Louisiana, LLC ("CCC"), the assignee of Station KNBB(FM), Ruston, Louisiana, filed a Supplemental Notice.

2. *Notice II* was issued in response to a rulemaking petition filed by Wisner Broadcasting Company ("WBC"). WBC tiled comments, and RBC filed the identical counterproposal that it had already filed in response to *Notice I*. Reply comments were filed by WBC and New South.

BACKGROUND

3. This consolidated proceeding began with the issuance of two unrelated *Norices of Proposed Rule Making*. In *Norice I*, the staff proposed the allotment of Channel 257C3 to Saint Joseph, Louisiana, as a first local transmission service, in response to a rulemaking petition tiled by SJBC on January 4, 2001. In support of its proposal, SJBC stated that Saint Joseph is an incorporated town located in Tensas Parish and had a 1990 U.S. Census population of 1,517 persons. To accommodate the Saint

¹ The communities of Ruston, Clayton, and Wisner, Louisiana, have been added to the caption of MM Docket No. 01-19.

² The communities of Ruston, Clayton, and Saint Joseph have been added to the caption of MM Docket No. 01-27.

³ *Saint Joseph, Clayton, Ruston, and Wisner, Louisiana*, 16 FCC Rcd 2305 (M.M. Bur. 2001).

⁴ *Wisner, Ruston, Clayton, and Saint Joseph, Louisiana*, 16 FCC Rcd 2568 (M.M. Bur. 2001).

Joseph allotment, *Notice I* also proposed the substitution of Channel 266A for vacant Channel 257A at Clayton, Louisiana. *Notice I* established a counterproposal deadline of March 19, 2001.

4. *Notice II* was issued in response to a rulemaking petition filed by WBC on January 3, 2001, and proposed the allotment of Channel 300C3 to Wisner, Louisiana, as a first local transmission service. No other related channel changes are required to accommodate this allotment. In support of its proposal, WBC had argued that Wisner meets the Commission's requirements for community status because it is an incorporated town in Franklin Parish and has a 1990 U.S. census population of 1,148 persons. *Notice II* established a counterproposal deadline of March 26, 2001.

5. In response to *Notice I* and *Notice II*, RBC simultaneously and timely filed the identical counterproposal in both proceedings. In its counterproposal, RBC proposed to upgrade its Station KNBB(FM), Ruston, Louisiana, from Channel 257C3 to Channel 257C2 and to modify its license for Station KNBB(FM) to specify operation on Channel 257C2 pursuant to the provisions of Section 1.420(g)(3) of the Commission's Rules.⁵ To accommodate this co-channel upgrade, RBC proposed to (1) substitute Channel 266A for Channel 257A at Clayton, Louisiana; (2) allot Channel 300C3 at Saint Joseph, Louisiana, rather than Channel 257C3 as proposed by **SJBC** in MM Docket No. 01-19; and (3) allot Channel 279A at Wisner, Louisiana, rather than Channel 300C3 as proposed by WBC in MM Docket No. 01-27.⁶ Further, RBC stated that it would apply for these proposed Wisner and St. Joseph allotments if they are adopted.

CONSOLIDATION OF THE PROCEEDINGS

6. As a threshold matter, we believe that it is appropriate to consolidate *Norices I and II* into a single proceeding because of the filing of RBC's identical counterproposal in both proceedings. In this regard, RBC's proposed upgrade of its Station KNBB(FM), Ruston, from Channel 257C3 to Channel 257C2 is mutually exclusive with SJBC's proposed allotment of Channel 257C3 at Saint Joseph because the channels are short-spaced under the Commission's minimum distance separation rules. As a result, RBC's counterproposal is properly filed in response to *Notice I*. However, recognizing that an alternate channel is available that would theoretically permit the grant of RBC's proposed upgrade and the allotment of a Class C3 channel at Saint Joseph, RBC has further suggested that Channel 300C3 be allotted to Saint Joseph instead of Channel 257C3 as proposed in *Notice I*. Since the proposed allotment of Channel 300C3 at Saint Joseph is short-spaced to the proposed allotment of Channel 300C3 at Wisner as proposed in *Notice II* and since this counterproposal was timely filed in both proceedings, these two proposals are mutually exclusive. Under these circumstances, we believe that the public interest is best served by considering all of these proposals in the same proceeding.

COMMENT SUMMARY

7. In its comments and counterproposal, RBC acknowledges that on March 19, 2001, the date the counterproposal was filed in both MM Dockets 01-19 and 01-27, its proposed allotment of Channel 257C2 at Ruston was short-spaced by 15.4 kilometers to a counterproposal (RM-9991) to allot Channel 257C1 to Linden, Texas, which was filed on January 2, 2001, in MM Docket No. 00-228. However, RBC contends that this counterproposal should be ignored because a request to withdraw the

⁵ 47 C.F.R. § 1.420(g)(3) permits upgrades of FM stations on mutually exclusive co-channels or adjacent channels without affording other interested parties an opportunity to file competing expressions of interest in the upgraded channel.

⁶ RBC's counterproposal was originally placed on Public Notice in MM Docket No. 01-19 as RM-10048 on October 5, 2001, Report No. 2506. A corrected Public Notice was released on October 23, 2001, Report No. 2506. RBC's counterproposal was also placed on Public Notice in MM Docket No. 01-27 as RM-10118 on May 21, 2001, Report No. 2485.

Linden counterproposal was filed on March 15, 2001. Further, RBC contends that even if the withdrawal request is not granted, the Linden counterproposal is defective and should, therefore, not be an impediment to consideration of RBC's counterproposal.

8. RBC also recognizes that SJBC's proposed allotment of Channel 257C3 at Saint Joseph would serve 26,770 more persons than RBC's proposed allotment of Channel 300C3 to St. Saint Joseph and that WBC's proposed allotment of Channel 300C3 at Wisner would serve 16,622 more persons than RBC's proposal to allot Channel 279A at Wisner. However, RBC contends that this difference in service is offset by the gain in service to 91,607 persons that would result from the upgrade of RBC's Station KNBB(FM), Ruston, Louisiana, from a Class C3 to a Class C2 channel.⁷

9. In other comments filed in MM Docket No. 01-19, SJBC tiled a continuing expression of interest in applying for and building a station on Channel 257C3 at Saint Joseph, and BK filed an additional expression of interest in this allotment. Similarly, WBC filed comments, restating its present intention to apply for Channel 300C3 at Wisner.

10. No reply comments were filed in response to *Norice I* or *Notice II*. However, three reply comments were filed in response to the *Public Notices* announcing the filing of RBC's counterproposal.⁹ First, SJBC and WBC, who are represented by the same counsel, tiled essentially the same reply comments in both proceedings. Therein, SJBC and WBC argue that RBC's counterproposal should be dismissed because it was not technically correct at the time it was filed. In support of this position, they point out that RBC's proposed allotment of Channel 257C2 at Ruston was, at the time it was filed, short-spaced to a pending proposal to add Channel 257C1 to Linden, Texas, in MM Docket No. 00-228 and that this counterproposal had been cut-off on January 2, 2001. They state that RBC has already acknowledged this short-spacing, but they argue that RBC has erroneously claimed that its counterproposal should be accepted because a request for approval to withdraw the Linden proposal had been tiled and RBC believed the Linden proposal was defective and could be ignored. SJBC and WBC argue that long standing Commission policy requires that allotment counterproposals must "be technically correct and substantially complete at the time they are filed." Further, they contend that "[t]he Commission has also long made clear that its 'policy is not to accept proposals that are dependent or contingent upon finality of other actions or proceedings.'" Since the Linden counterproposal remained pending and since a request to withdraw the counterproposal had not been acted upon on March 19, 2001, the date that RBC filed its counterproposal, SJBC and WBC conclude that RBC's counterproposal was both technically deficient and contingent upon the dismissal of the Linden proposal and, therefore, must be dismissed pursuant to precedent.

⁷ RBC notes that Station KNBB(FM), Ruston, provides 1 mV/m (60 dBu) service to 70,885 persons in an area of 3,772 square kilometers. The proposed upgrade of Station KNBB(FM) from Channel 257C3 to Channel 257C2 could provide service to 162,492 persons in 4,730 square kilometers. See Attachment I to RBC Counterproposal at 2.

⁸ See *supra*, note 6.

⁹ *Cloverdale, Montgomery and Warrior, AL*, 12 FCC Rcd 2090,2093 (Policy and Rules Div. 1997), *aff'd* 15 FCC Rcd 11050 (2000); *Carlisle, Irvine, and Morehead, KY*, 12 FCC Rcd 13181, 13182 (Allocations Br. 1997). See also *Fort Bragg, CA*, 6 FCC Rcd 5817 (Allocations Br. 1997); *Provincetown, Dennis, Dennis Port, West Yarmouth, and Harwich Port, MA*, 8 FCC Rcd 19 (Policy and Rules Div. 1992); and *Sanford and Robbins, NC*, 12 FCC Rcd 1 (Allocations Br. 1997).

¹⁰ SJBC's Reply Comments of October 22, 2001 at 3, citing *Columbia City, FL*, 14 FCC Rcd 21165 n.1 (Allocations Br. 1999), citing *Cur and Shoot, TX* 11 FCC Rcd 16383 (Policy and Rules Div. 1996).

11. Second, RBC filed comments¹¹ in reply to WBC and SJBC's reply comments, contending that the Linden proposal was not acceptable in MM Docket 00-228 because it was short-spaced to RBC's Station KNBB(FM), Ruston. As a result, RBC asserts that "the Linden proposal was a nullity from the time it was filed and is not the type of existing facility or valid proposal that the Commission requires parties to take into account in presenting counterproposals."¹² On the contrary, RBC argues that the cases involving technical correctness cited by WBC and SJBC involve conflicts with previously filed counterproposals in other proceedings that are themselves technically correct and complete. Further, noting that the Linden proposal was filed by the same counsel as represents WBC and SJBC, RBC contends that "[t]o accept WBC's argument would only serve to facilitate disingenuous allotment gamesmanship to the clear detriment of the public interest."¹³ Since the Linden proposal had been voluntarily withdrawn at the time RBC filed its counterproposal and since MM Docket 00-228 was resolved on May 18, 2001, RBC asserts that its counterproposal can now be granted.

12. Third, New South, the licensee of Station KJLO-FM, Channel 28.1C, Monroe, Louisiana, filed reply comments, expressing concern that RBC's proposed allotment of Channel 279A at Wisner may result in a short-spacing to Station KJLO-FM and requested additional time to conduct an engineering analysis on the Wisner proposal. However, Commission records reveal that New South did not file further comments.

DISCUSSION

13. After careful consideration of the record in this proceeding, we believe that RBC's counterproposal must be dismissed. Counterproposals are required to be technically correct and Substantially complete at the time they are filed.¹⁴ On March 19, 2001, the date when RBC filed its counterproposal, RBC's proposed allotment of Channel 257C2 at Ruston was short-spaced by 15.4 kilometers to a pending counterproposal (RM-9991) to allot Channel 257C1 to Linden, Texas, in MM Docket 00-228.¹⁵ Further, as recognized by SJBC and WBC, our policy is not to accept rulemaking proposals that are contingent on the licensing of facilities set forth in an outstanding construction permit¹⁶ or are dependent upon final action in another rulemaking proceeding.¹⁷ Although a request to withdraw the Linden counterproposal in MM Docket 00-228 was filed on March 15, 2001, and although RBC believes that the Linden counterproposal was defective, we did not approve the withdrawal of the Linden rulemaking proposal until May 18, 2001, when a *Report and Order* was released in MM Docket 00-228.¹⁸

¹¹ This reply comment is timely because it was filed by the deadline established in the Public Notice in MM Docket 01-19 for submitting reply comments to the filing of RBC's counterproposal.

¹² RBC's Reply Comments of October 22, 2001 in MM Docket 01-19, at 2.

¹³ *Id.*

¹⁴ See e.g., *Broken Arrow and Bixby, Oklahoma, and Coffeyville, Kansas*, 3 FCC Rcd 6507 6511 n.2 (Policy and Rules Div. 1988). *recon. denied*, 4 FCC Rcd 6981 (1989); *For! Bragg, CA*, 6 FCC Rcd 6817 (1991); *Provincetown et al., MA*, 8 FCC Rcd 19 (1992); and *Sanford and Robbins, NC*, 12 FCC Rcd 1 (1997). See also cases cited by SJBC and WBC, *supra* note 9.

¹⁵ The Linden counterproposal was filed on January 2, 2001, the deadline for filing counterproposals in MM Docket 00-228, and, therefore cut-off from other rulemaking proposals on that date.

¹⁶ See *Cur and Shoot, TX*, 1 FCC Rcd 16383 (Policy and Rules Div. 1996).

¹⁷ See cases cited by SJBC and WBC, *supra* note 11. See also *Auburn, Northport, Tuscaloosa, et al., AL*, DA 02-2063, released August 30, 2002, at para. 4, *recon. pending*.

¹⁸ *Linden, White Oak, Lufkin, TX, et al.*, 16 FCC Rcd 10853 n.1 (Allocations Br. 2001). Section 1.420(j) provides procedures that must be complied with before a rulemaking proposal may be withdrawn in an FM or television allotment rulemaking proceeding. Most notably, a showing must be made that any Consideration paid for the (continued...)

As a result, RBC's counterproposal was, on the date when it was filed, contingent on the dismissal of the Linden counterproposal in MM Docket 00-228, and, therefore, must be dismissed.¹⁹

14. Having dismissed RBC's counterproposal, we are left with two rulemaking proposals that are not mutually exclusive with each other and whose grant would serve the public interest by providing first local transmission services to two communities. Consequently, we will allot Channel 257C3 to Saint Joseph, Louisiana." To accommodate the new allotment at Saint Joseph, we will substitute Channel 266A for vacant Channel 257A at Clayton, Louisiana." Likewise, we will allot Channel 300C3 to Wisner, Louisiana, as requested by WBC.²²

15. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b), and 0.283 of the Commission's Rules, IT IS ORDERED, That effective February 24, 2003, the FM Table of Allotments. Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below, as follows:

<u>Communities</u>	<u>Channel Number</u>
Saint Joseph, Louisiana	257C3
Clayton, Louisiana	266A
Wisner, Louisiana	300C3

16. Filing windows for Channel 257C3, Saint Joseph, Channel 266A, Clayton, and Channel 300C3, Wisner, will not be opened at this time. Instead, the issue of opening these allotments for auction will be addressed by the Commission in a subsequent order.

17. IT IS FURTHER ORDERED, That the counterproposal (RM-I0048 and RM-I0118) filed by Ruston Broadcasting Company, Inc., IS DISMISSED.

18. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

(...continued From previous page)

withdrawal of the counterproposal does not exceed legitimate and prudent expenses in prosecuting the rulemaking or counterproposal.

¹⁹ With respect to RBC's contention that dismissal of its counterproposal would facilitate gamesmanship because SJBC, WBC, and the Linden counterproponent are all represented by the same counsel, we believe that this is a speculative argument. No extrinsic evidence has been presented to indicate that the Linden proposal was not tiled or withdrawn in good faith or that an abuse of the Commission's processes has occurred.

²⁰ The reference coordinates for Channel 257C3 at Saint Joseph are 32-51-44 and 91-11-41.

²¹ The reference coordinates for Channel 266A at Clayton are 31-44-48 and 91-31-16,

²² The reference coordinates for Channel 300C3 at Wisner are 32-05-28 and 91-28-57. Since we are alloning Channel 300C3 in lieu of Channel 279A at Wisner, New South's concerns regarding a short-spacing to its Station KJLO-FM, Channel 281C, Monroe, Louisiana, are moot. However, we do note that Channel 279A at Wisner could be site restricted to clear Station KJLO-FM, Channel 281C, Monroe.

19. For further information concerning this proceeding, contact Andrew J. Rhodes, Media Bureau, (202) 418-2180. Questions related to the application filing process for Channel 257C3 at Wisner, Channel 266A at Clayton, or Channel 300C3 at Wisner, Louisiana, should be addressed to the Audio Division, Media Bureau, (202) 418-2700.

FEDERAL COMMUNICATIONS COMMISSION

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